REPLY TO SARAH BURNS

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I am a lawyer, academic, and feminist who has often found it difficult to integrate these aspects of myself. I therefore decided to write an essay to ask the feminist community why and how we are to use the courts in constitutional litigation consistent with our feminist understanding of society as well as our vision for the future. I wanted to engage in dialogue with feminists and make some modest suggestions to help us be more persuasive and effective in our feminist efforts. I sought publication in the *Harvard Women's Law Journal* so that I could speak directly with feminists. I was thrilled to have Sarah Burns, one of the leading women's rights activists in the United States, respond to my essay.[1]

The core disagreement between Burns and myself seems to be strategic—whether a group-based, equality argument that focuses on women's position in society and "lets in the fetus" would be an effective, feminist argument against societal coercion of women's reproductive choices. I believe that such an argument would be *more* effective than the present privacy approach which does not centrally discuss women's well-being or acknowledge the importance of valuing fetal life.[2] Rather than re-elaborate my theoretical reasons for preferring an equality approach to a privacy approach,[3] I would like to apply the equality approach to the Angela Carder case.[4] The reader can then judge whether my

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[1] *See* Sarah Burns, *Notes from the Field: A Reply to Professor Colker*, in this Volume. Hereinafter references to this work will be noted in the text as (Burns, p. _____).

[2] I do *not* hold my position because it is "feminine"; I hold it because I believe it is feminist, i.e., that it will further women's well-being in society. I also do not try to transfer consciousness-raising to litigation without sensitivity to the changed context. The important point is to be aware of the shortcomings of each mode of discourse and to consider context carefully when deciding which mode to use.

[3] My reasons include the following: (1) a group-based, radical approach is more consistent with how feminists consider the abortion issue, (2) an equality approach, if successful, provides fuller protection to all women in society, (3) many members of society value fetal life, so that we act at our own peril in not responding to beliefs that are most likely present in our audiences' minds, and (4) a privacy approach feeds right into the "women are selfish" mentality to which Burns alludes.

[4] *In re* A.C., 533 A.2d 611, 617 (D.C. 1987).

approach is feminist and persuasive.[5] Before Angela Carder became pregnant, she understood that her pregnancy would be high-risk as a result of her having leukemia.[6] She had married at age twenty-seven, at which time her cancer had been in remission for three years. She had not undergone chemotherapy for over a year. At that time she and her husband decided to have a child together, and she soon became pregnant.[7]

At the twenty-fifth week of her pregnancy, Ms. Carder saw a physician when she experienced shortness of breath and back pains. She was diagnosed as having a tumor on her lungs. She was admitted to the hospital on June 11, 1987, and her condition was diagnosed as terminal.[8] At first, she was told that she would die within weeks; on June 15, 1987, she was told that she might die much sooner.[9]

Ms. Carder could have insisted on passive treatment, in which case she and her fetus would have died relatively quickly. In-

[5] It is difficult to make equality arguments under the Court's present interpretation of the equal protection clause because of the combination of *Geduldig* and *Feeney*. *See* Dwight Gedudlig v. Carolyn Aiello, 417 U.S. 484, 496 n.20 (1974) (concluding that pregnancy-based distinctions do not constitute sex-based classifications); Personnel Administrator v. Helen Feeney, 442 U.S. 256 (1979) (holding that classifications that adversely affect one sex are not subject to heightened judicial scrutiny unless classification itself is sex-based or adverse effect reflects "purposeful discrimination"). I have two modest suggestions for overcoming this problem. As I have outlined in an earlier paper, first, we could argue that an action predicated on disrespect for women's well-being violates the due process clause's liberty component. We could argue that Ms. Carder's right to her own life falls within the liberty protections of the due process clause. Second, we could rely on the equal protection clause by challenging the "but for" causation requirement of *Feeney* rather than the "pregnancy is not a sex-based condition" holding of *Geduldig*. *See* Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1013, 1045–46 (1990). The argument would be that the "but for" causation requirement is based on a race discrimination model in which we expect to find actual hatred of the group that is being treated unconstitutionally. *Id.* Although men sometimes treat women with disrespect because they hate women, I do not believe that such an account adequately describes the nature of discrimination against women. It is equally likely that discrimination against women occurs because men act paternalistically without inquiring into the understanding women have of their own best interest, or, as in Ms. Carder's case, without giving serious consideration to women's well-being. I suggest that the *Feeney* test for non-sex-based classifications that adversely impact women should inquire as to whether the actions are predicated on disrespect for women's well-being. As I argued above, there is compelling evidence that such disrespect served as a predicate for the hospital's actions in the Carder case. Although these arguments are difficult to make doctrinally, I believe they are worth making, especially given the growing disrepute of privacy doctrine.

[6] 533 A.2d at 612.

[7] *See id.*; *see* George J. Annas, *She's Going to Die: The Case of Angela C.*, HASTINGS CENTER REPORT, Feb.-Mar. 1988, 23, 23.

[8] 533 A.2d at 612.

[9] *See* Annas, *supra* note 6, at 23.

stead, she agreed to life-sustaining treatment so that a cesarean section could be performed at the twenty-eighth week of her pregnancy and the fetus could be given a reasonable chance to live.[10] To the extent that her wishes could be ascertained, it appeared that she did not want the cesarean section performed before the twenty-eighth week because of the strong likelihood that the fetus might be severely disabled, if it could live at all.[11] She also wanted her own health and comfort to receive primary consideration.[12] She apparently believed that it would be in everyone's interest for her to stay alive for two more weeks and have the cesarean section performed at that time.[13] Ms. Carder's husband and mother—the people who would most directly feel the loss of Ms. Carder's life as well as the effects of the loss or survival of the fetus—apparently agreed with her resolution of this difficult moral and ethical dilemma.[14]

Despite Ms. Carder's and her family's expression of their opinions, the hospital sought a declaratory order from the Superior Court "as to what it should do in terms of the fetus."[15] A "hearing" was convened at the hospital, without Ms. Carder present. The judge then decided to order a cesarean section so that the fetus would have an opportunity to live; he did not discuss the action's consequences for Ms. Carder's life.[16] The judge was informed shortly thereafter that Ms. Carder was awake and had clearly communicated that she did not want a cesarean section performed at that time.[17] However, after reconvening the court, he affirmed his original order, saying that the order was appropriate even if she refused to consent.[18] The entire "hearing" apparently took about an hour.[19]

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[10] *Id.*

[11] *See id.* (citing testimony of attending physician). *But see* 533 A.2d. at 613 (noting that Ms. Carder had not been given opportunity to decide between relinquishing her life and the life of the fetus in the event that decision had to be made prior to 28 weeks).

[12] *See* Annas, *supra* note 6, at 23.

[13] *See id.*; 533 A.2d at 613.

[14] *See* Annas, *supra* note 6, at 23.

[15] 533 A.2d at 612.

[16] *Id.* at 612–13.

[17] *See* Annas, *supra* note 6, at 24 (citing testimony of Alan Weingold, Chief of Obstetrics, who reported that Ms. Carder had mouthed the words "I don't want it done" when asked to consent to the surgery after court's initial decision).

[18] *Id.* at 24 (although the judge indicated he was not sure what her intent was, he concurred in suggestion of Counsel for District of Columbia that "her current refusal did not change anything because the entire proceeding had been premised on the belief that she was refusing to consent.").

[19] *Id.*

A ten-minute appeal took place in a telephone conversation with a three-judge panel. The panel denied the request for a stay.[20]

Doctors performed the nonconsensual abortion[21] on Ms. Carder, and the nonviable fetus died approximately two hours later. Ms. Carder died approximately two days later; her death was most likely hastened by the abortion.[22] Five months later, the court of appeals issued its opinion which, in Burns' view, was premised on the assumption that Ms. Carder's and her family's wishes could be discounted as "selfish." (Burns, p. 204 & note 2) I believe the most effective feminist argument about the Carder case would reveal (1) that the hospital's and court's actions were predicated on an unconstitutional disrespect for Ms. Carder's well-being as a woman,[23] and (2) that such unconstitutional action could not be justified in the name of protecting fetal life, because judicial intervention did not better serve the interest in protecting life than Ms. Carder's own decision.[24] By contrast, I believe that the traditional feminist privacy argument would not effectively show how the specific coercive actions were unconstitutional. Rather, it would feed into the stereotype of women's selfishness by not placing the case in its broader context[25] and not affirming how Ms. Carder and other women *do* value life.

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[20] *Id.*

[21] I use the word "abortion" because an abortion involves removal of a fetus from a woman's body. The fact that a fetus is aborted does not necessarily mean it must die. I believe it is helpful conceptually to understand that the hospital and judge forced Ms. Carder to abort the fetus, albeit in the dim hope that the fetus might live. In other words, the cesarean itself was not a medical treatment; it was a coerced abortion. I borrow this use of the word abortion from George Annas, *supra* note 6, at 24. I am surprised that Burns describes the action as medical "treatment" or "forced surgery" rather than as an abortion. (Burns, p. 190). Ironically, the court of appeals found that "this case is not about abortion," 533 A.2d at 614, and was unable to see that the trial court had, in fact, ordered an abortion.

[22] The court of appeals concluded that "the surgery might have hastened her death." 533 A.2d at 613. It also stated that the surgery "may have shortened A.C.'s life span by a few hours." *Id.* at 614. Burns apparently believes that the coerced abortion shortened Ms. Carder's life by even more time. (Burns, p. 190 n.4).

[23] I agree with Burns that all feminist discussions must begin with a discussion of women's well-being; I also agree with her that feminist briefs offering graphic descriptions of the consequences of reproductive decisions for women's well-being have been excellent.

[24] Burns claims that my position on abortion is the same as Michael Perry's. (Burns, n.8) That is simply not true. I criticize Perry in Ruth Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363 (1989) and agree with Joan Williams' criticism of Perry's abortion discussion, with which Burns also agrees. (Burns, n.8 (referring to Joan C. Williams, *Abortion, Incommensurability, and Jurisprudence*, 63 TUL. L. REV. 1651 (1989)).

[25] Burns and I both agree that feminist arguments about reproductive choice should

I would therefore begin with a discussion of Ms. Carder's well-being. I would argue that only institutions that did not respect Ms. Carder's well-being could act as did the trial court and hospital, whose collective actions actually *hastened Ms. Carder's death* without expressing concern for that eventuality.[26] Similarly, the court of appeals failed to respect Ms. Carder's well-being by ignoring the shortening of her life and not attempting to prevent future repetition of such coercive actions. Ms. Carder received far fewer procedural protections than we would ever permit in the case of a criminal sentenced to death. Her wishes expressed before the hearing were ignored, and the judges did not bother to talk with her despite the fact that she regained consciousness during the legal wrangling.[27] The court had to treat Ms. Carder, a live and conscious person, as if she was already dead to justify this extraordinarily coercive action.

In addition, I would try to deconstruct the "selfishness" arguments by showing how they are disrespectful to women's well-being. I would look at the entire context in which Ms. Carder acted to see a woman who had been diagnosed with leukemia fifteen years earlier, gone into remission, become pregnant, and now wanted to defy predictions that she and her fetus would die in a couple of days. By stereotyping her as a selfish woman, as the opinion implicitly suggests, the court could not see the context in which Ms. Carder was acting to protect her own and others' well-being. A group-based equality approach could bring that context to the forefront by bringing Ms. Carder's entire life, rather than the relatively momentary period of pregnancy, to the court's attention. It is only through sexist stereotypes about pregnant women that the court could justify its actions.[28] Such sexist predicates to state action, I would argue, are unconstitutional

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focus on the entire context of women's lives. Where we disagree is that I believe an equality approach achieves that end better than a privacy approach.

[26] Although the superior court heard medical testimony that Ms. Carder would "probably die within the next twenty-four to forty-eight hours" even absent the physical strain that surgery placed on her body, I agree with George Annas that the additional burden of recovery from major surgery and the knowlege of her child's death was deleterious to her own survival. *See* Annas, *supra* note 6, at 24; *see also* discussion *supra* note 21.

[27] *See id.*; 533 A.2d 613.

[28] Thus, I agree with George Annas, who has written that "[t]he ultimate rationale for the decision may be purely sexist," although I would substitute "was" for "may be." Annas, *supra* note 6, at 25.

under the liberty component of the due process clause or the equal protection clause of the fourteenth amendment.[29]

Having established that the hospital's decision and the court's action were predicated on an unconstitutional disrespect for Ms. Carder's well-being, I would respond to the asserted justification for this action—the protection of fetal life.[30] In responding to this asserted justification, I acknowledge that society benefits by valuing life in all of its various forms, including fetal life.[31] From a public policy perspective, I would insist that judges must face the question of whether judicial intervention into these kinds of cases serves any productive function. Is there reason to believe that life would be more valued if judges rather than pregnant women were responsible for making difficult reproductive decisions?[32] I believe the answer is clearly no. In my view, Ms. Carder, for example, demonstrated an extremely high valuation of life in all of its various forms. As I see it, her valuation of potential life led her to become pregnant and decide to bear the enormous burdens of pregnancy and childbirth. It also led her to conclude that a cesarean section should occur at the twenty-eighth week of her pregnancy rather than the twenty-sixth week. Her valuation of the quality of the life of her husband and mother led her to want not to impose upon them the burdens of raising a severely disabled child. The valuation of her own life led her to conclude that she should be permitted to live as comfortably as possible for the last weeks of her life. By contrast, a superior

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[29] U.S. CONST. amend. XIV. By substituting their judgment for that of the woman, her family, and her physician in a brief time period without knowledge of the entire situation, judges seriously undermine basic procedural protections while dramatically infringing a woman's liberty interest. The Supreme Court of Canada, by contrast, has unanimously ruled that a sexual partner could not intervene in private, reproductive decisions. *See* Jean-Guy Tremblay v. Chantal Daigle, [1989] 2 S.C.R. 530, 533 (unanimously agreeing to set aside injunction obtained by Tremblay against Daigle, his former girlfriend, from having an abortion).

[30] Burns says that I believe that the fetus should be the "focal" point of the discussion. (Burns, p. 000). I never make that claim. I agree that we should begin by discussing how state action, or anything else at issue, affects women's well-being. I argue that we should then *respond* to the state's purported pro-life arguments.

[31] By "letting in the fetus," I am *not* saying that we should consider the fetus to be a person or separate entity with rights, and I am *not* saying that society is entitled to protect fetal life by acting coercively in women's lives. I am saying that it is appropriate for society to be concerned about the ways that we demonstrate our commitment to and concern about life. I want feminists and others to discuss abortion in ways that make clear that we celebrate life, not the destruction of life.

[32] *See* Annas, *supra* note 6, at 25.

court judge's clumsy one-hour intervention and an ineffectual fifteen-minute "appeal" were predicated on enormous disrespect for the length and quality of Ms. Carder's life and did not further the length and quality of the fetus' life.[33]

A major problem underlying the court's analysis is its insistence on viewing the case as one of competing rights—the rights of the pregnant woman versus the rights of the fetus. By suggesting an equality approach which "lets in the fetus," I am trying to remove us from a bipolar, oppositional way of thinking about pregnant women and their fetuses. My approach shows how the pregnant woman's interests and the fetus' interests coincide rather than conflict. By showing how women generally make difficult reproductive decisions *because of* rather than *in spite of* their valuation of life in its various forms, I believe we can persuade people that pregnant women are the people most likely to protect life in all of its forms. It is they, therefore, who deserve decision-making responsibility for reproductive choices, rather than judges who are accustomed to thinking about pregnant women and fetal life as oppositional.

More generally, we can conclude from the Carder case that judicial intervention serves no productive function. Judges are no more likely to protect the interest in life, in all of its various forms, than the pregnant woman who is facing a highly contextualized ethical dilemma. In addition, the possibility of judicial intervention stalls our health care system because risk managers feel compelled to turn to a court to ask "what should we do?" as they did in the Carder case, rather than communicate directly with the people involved—the pregnant woman, her family, and her physicians—and immediately begin desired and effective treatment.[34] Judges need to understand that they peform no productive function by trying to act as "God" in these kinds of cases, pretending that there is an ultimate "right" ethical answer that they can determine abstractly in a brief time period; all they demonstrate is their disrespect for family members by substitut-

[33] Notably, the nonviable fetus died approximately two hours after the surgical procedure was performed. *See id.* at 24.

[34] *See id.* at 25 (observing that "[t]o ask judges to make the treatment decision to protect the hospital from some speculative potential liability simply invites them to play doctor; something they might enjoy, but something about which judges possess no more competence than the average person on the street").

ing their abstract judgment for the highly contextualized judgment of the people who are dealing with a difficult ethical dilemma.[35]

The ultimate irony in the Carder case is that Ms. Carder was *not* choosing an abortion—she was choosing to continue her pregnancy in the hope that she might live for a few more weeks. She had planned her pregnancy and looked forward to the birth of a healthy child. That the state could intervene to abort her nonviable fetus and hasten her death should offend our valuation of life and choice. Thus, I am not afraid to discuss the Carder case by "letting in the fetus." In fact, I think that by doing so I create a more effective argument. But I leave that conclusion for the reader to judge.

[35] More generally, this kind of judicial intervention stalls our healthcare system by making physicians afraid to perform an abortion, as well as afraid not to perform an abortion, because someone other than the woman can make the decision.